

# ARBITRATION ADVISORY

2003-03

## AWARDING PROGRAM FILING FEES

October 20, 2003

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### INTRODUCTION

Business and Professions Code section 6203(a) provides that an arbitration award under the Mandatory Fee Arbitration program:

“. . . shall not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceeding, notwithstanding any contract between the parties providing for such an award or costs or attorney's fees. **However, the filing fee paid may be allocated between the parties by the arbitrators.**" (emphasis added)

This Advisory addresses the dual questions of under what circumstances and how program filing fees should be "allocated" as provided by the governing statute. In addition, the subsidiary questions of allocating the program filing fee when a waiver of the fee has previously been approved or when the filing fee paid does not cover a disputed amount larger than that initially asserted by the petitioner is also addressed.

### DISCUSSION

#### Allocating Filing Fees

The Mandatory Fee Arbitration statute allows the State Bar of California's Board of Governors to approve rules governing arbitrations under the program and specifically authorizes the rules to include a provision for a filing fee "in such amount as the board may, from time to time, determine." [Bus. & Prof. Code § 6200(a)].

The State Bar Committee on Mandatory Fee Arbitration periodically reviews and approves rules adopted by local bar associations for the administration of their local fee arbitration programs, including program filing fees which vary among the local programs.

Program filing fees vary from nominal amounts to several thousands of dollars, depending upon the amount in controversy and the fee schedule of the particular local program. The Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs set no minimum or maximum amounts but requires that the fee “. . . shall not be in such an amount as to discourage the use of the service” [Guidelines and Minimum Standards, § II, ¶ 14].

Many local programs – as well as the State Bar program – provide for a waiver of the filing fee under certain circumstances [see e.g., Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California, Rule 15.0]. The counterbalancing factors generally weighed in evaluating applications for fee waivers are, on the one hand, the desire to keep the mandatory fee arbitration program as consumer-accessible as reasonably possible and, on the other, the essentially voluntary nature of the program which still leaves the parties free to pursue remedies otherwise available to them at law.

Code of Civil Procedure section 1032(b),<sup>1</sup> dealing with the recovery of litigation costs, does not apply to arbitration proceedings in general [see C.C.P. §1284.2]<sup>2</sup> or to arbitration proceedings conducted pursuant to the Mandatory Fee Arbitration program specifically [see Bus. & Prof. Code § 6203(a)].<sup>3</sup> The mandatory fee arbitration program does not have any fee- or cost- shifting provisions such as those found in Code of Civil Procedure section 1141.21(a)<sup>4</sup> that imposes program costs and fees on a party who unsuccessfully rejects a judicial arbitration award or in Labor Code section 2692 proceedings<sup>5</sup> between manufacturers and contractors when there is a finding that a claim is “frivolous.”

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<sup>1</sup>CCP § 1032(b) provides: “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.”

<sup>2</sup>CCP § 1284.2 provides: “Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his own benefit.”

<sup>3</sup>B & P Code § 6203(a) provides, in part: “The award shall not include any award to either party for costs or attorney’s fees incurred in preparation for or in the course of the fee arbitration proceeding, notwithstanding any contract between the parties providing for such an award of costs or attorney’s fees. However, the filing fee paid may be allocated between the parties by the arbitrators.”

<sup>4</sup>CCP § 1141.21(a): “If the judgment upon the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court shall order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and upon motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice:

<sup>5</sup>Labor Code § 2692 provides: “The basic costs of the arbitration proceeding, including interpreters requested by the panel, shall be borne equally by all parties to the proceeding, provided, however, that the panel may as a part of its award impose all such costs on the party requesting arbitration if a majority of the panel determines that the matter brought before it was frivolous. In addition, in the case of a frivolous claim the panel may impose upon the party requesting arbitration the costs of translators, court reporters, and reasonable attorneys fees incurred by the other party.”

Business & Professions Code section 6203(a) does, however, specifically allow for permissive allocation of the program filing fees. The form prescribed for a “Findings and Award” by the State Bar contains a line requiring a determination of how the filing fee is to be allocated between the client and the attorney, even though the program rules themselves only provide that the “award may include an allocation of the filing fee” [see Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California, Rule 37.8].<sup>6</sup>

Arbitrators should note that the allocation of program filing fees under the statute is always permissive and never mandatory. The statute and rules are silent as to when or how program filing fees *should* be allocated. There is no statutory provision or rule comparable to Code of Civil Procedure section 1032(b), so there is no requirement that arbitrators must determine who is the prevailing party.

Some fee arbitrations result in all-or-nothing awards where one party prevails absolutely on every claim asserted or contested in the proceeding and no relief whatsoever is afforded to the other party. While the statute would still permit an allocation of the program filing fees in these cases should the arbitrator(s) believe that equity compelled such a division, these cases presumably would be instances in which the decision would award the entire filing fee to one party.

There may be other arbitrations where a natural division of the program filing fees suggests itself. For example, a dispute may involve a situation where the law provides that the attorney is to receive a “reasonable” fee but there is no contractual arrangement from which the fee can be calculated with any precision. The attorney may have proposed one fee and the client another. In this situation, the arbitration award might well land at the mid-point, and logically an equal apportionment of the program filing fees would seem to be appropriate.

Many – perhaps most – fee arbitrations result in incomplete victories for either party, with one party achieving a measure of success but not complete vindication. Commonly, the client prevails as to a portion of the fees charged by the attorney and is awarded a partial refund or the attorney prevails as to a portion of the fees which were contested by the client – sometimes both.

Rarely is a mechanical *pro rata* comparison of the fees charged versus the fees awarded the appropriate measure for allocating the program filing fees. A far more significant calculation is a comparison of the contested fees with the final determination of the appropriate fees. A good starting point would be to compare the amount in dispute with the amount actually awarded. For example, if the client is challenging 25% of the fees charged by the attorney and the arbitration award grants a 15% reduction in fees rather than the 25% requested, the client has prevailed to a degree; specifically 60%, or 15/25 of the amount challenged by the client. A *pro*

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<sup>6</sup>Rule 37.8: “The award may include an allocation of the filing fee and any fee paid by the client for filing a stay with the court; however, it shall not include an award for any other costs of the arbitration, including attorneys fees resulting from the arbitration proceeding.”

*rata* allocation calling for the client to be reimbursed for 60% of the program filing fees would nevertheless probably still be unjust. In a civil action for business losses or breach of contract, for example, a client challenging 25% of the fees and achieving a 15% reduction would clearly be considered to be the prevailing party by most any standard utilized in a Code of Civil Procedure section 1032(b) analysis because the client has recovered 60% of the amount of the prayer of the complaint. There is therefore an excellent chance that this hypothetical client would be awarded 100% of the litigation costs under a Code of Civil Procedure section 1032(b) analysis.

In the alternative, consider a situation where the client challenges the entire fee, asserting that the attorney's services were "valueless." Suppose the evidence reflects that the attorney had already offered a 10% reduction in fees to address the client's specific objections but that the client has elected instead to refuse to pay (or to seek a refund of) the entire fee, motivated perhaps by a less than satisfactory result from the underlying legal representation. If the arbitration award affirms the bulk of the fees charged by the attorney, even if some small reduction is ordered, the attorney has "prevailed" as to virtually all of the amount in dispute.

There are a number of questions which should be considered when addressing the apportionment of program filing fees. These questions include, but are not limited to, the following issues:

- (1) Was the arbitration really necessary? There are instances where small billing errors should ordinarily have easily been resolved by the parties but a client instead appears to have taken an unreasonable position and pushed the matter into an arbitration that borders upon the frivolous. The award may correct these minor billing errors but validate the bulk of the fees charged. Even if that party has achieved some small measure of success, any apportionment of the program filing fee should logically be denied or only granted in a minimal amount.
- (2) Has a party made admissions or concessions as to appropriateness or inappropriateness of some of the fees charged? It is fairly common for a client to argue that the ultimate settlement – with which he or she is satisfied – should have been achieved with far less preliminary work by the attorney. The client may argue that the attorney was spinning his or her wheels much of the time at the client's expense. The attorney may counter that he or she should be fully compensated for following routine practices, including standardized charges for file management, legal research, office overhead and the like. The arbitrator(s) may agree that the facts largely support the client's position. Relieving the client of a substantial portion of the program filing fees may be warranted under these circumstances.
- (3) How close are the question(s) presented? If one party was obviously right and other obviously wrong, the arbitrator(s) should consider awarding the entire filing fee to the party in the right, even though the award does not void or affirm the entire disputed fee. If the dispute presents novel or unusual questions, even an all-or-nothing award should logically also produce an equal apportionment of the

program filing fee, just as a court may order that each party bear his or her own costs in adjudicating a novel legal dispute.

- (4) Has the attorney complied with the appropriate standards for charging fees, keeping records, and billing practices? Fee arbitrations occasionally involve attorneys depending upon flawed retainer agreements which are voided by the arbitrator(s), disputes that depend on the attorney's recollection rather than documents to support particular charges, or irregular or bulk billing [see Arbitration Advisory 03-01 for a discussion]. The inability to determine what an appropriate fee should have been from the billings presented may have left the client little choice but to seek the assistance of the fee arbitration program. Even should the attorney be awarded a substantial portion of the fees claimed in such a case, relieving the client of the bulk of the program filing fee should be considered.
- (5) Does the client have unclean hands? Perhaps the client let months or even years go by before pointing out errors or flaws in periodic bills. Perhaps the client waited until the representation was concluded before examining the bills rather than remaining current in his or her payments. The arbitrator(s) may conclude that timely questions likely could have resolved many claims of mistake or of improper amounts being charged. Even if the arbitration results in the client prevailing as to all or most of the errors, the attorney may deserve to be relieved of the greater portion of the program filing fees.
- (6) Generally, who should pay, and in what proportion? Has either party made the process more difficult or costly to the other than was necessary or advisable? Arbitrators should not hesitate in applying notions of fairness or equity. Arbitrators do not need to rigidly adhere to the "prevailing party" concept as in civil litigation.

### **Waived Filing Fees and Increased Amounts In Dispute**

In determining any apportionment of program filing fees, the arbitrator(s) should not take into account any waiver of the filing fees granted to the client-petitioner by the program administrator or presiding officer. Decisions as to the apportionment of program filing fees should be made without consideration of whether the fees were paid in full or not. To do otherwise would reward solvent lawyers by giving them the benefit of a client's insolvency. If the filing fee has been waived because the client is insolvent, the arbitrator(s) should still determine the appropriate allocation of the fee and then note that the client's allocated portion (if any) has been waived by prior determination. Any portion of the filing fee determined to be due by the (presumably solvent) lawyer, however, should be directed to be paid to the program.

A corollary to the issue of allocating a filing fee that has been waived arises when the amount in dispute becomes greater than the amount asserted by the client-petitioner who paid a lower filing fee based on that lesser asserted amount. Following the same reasoning employed

in the context of fee waivers, it is within the arbitrator(s) discretion to assess the unpaid portion of the filing fee that should have been paid based on the (now) actual disputed amount if that amount is greater than the amount in dispute asserted by the petitioner when the request for arbitration was filed.

## **CONCLUSION**

Every fee arbitration award must decide whether the program filing fees are to be apportioned and, if so, in what manner. The determination is entirely in the arbitrator(s) discretion and not driven either by statute or case law. Principles of fairness and equity should guide the award of program filing fees in every case.